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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.3855 OF 2007**
**IN**
**APPEAL NO.334 OF 2005**
**IN**
**NOTICE OF MOTION NO.3185 OF 2004**
**IN**
**SUIT NO.3121 OF 2004**

Gopal L.Raheja & Anr. ..Appellants

Vs.

Vijay B.Raheja & Ors. ..Respondents

Mr.P.K.Samdani, Senior Advocate with
Mr.P.K.Shroff with Mr.Subodh Joshi with Ms.Radhika
Kalpatrai with Bharti Bhagwat i/b.P.K.S.Shroff &
Co.for the Appellants.
Mr.N.H.Seervai, Senior Advocate with
Mr.F.Pooniwala with Mr.S.Swaminathan with Niyati
Mehta with Ms.Janya Mahadkar with Mr.Bhushan Shah
i/b.J.Sagar & Associate for respondent Nos.1 to 4.
Mr.I.M.Chagla, Senior Advocate with Mr.J.C.Pereira
with Mr.S.V.Doijode and Ms.Meenakshi Iyer
i/b.Doijode & Associates for Respondent Nos.5 to 7.
Mr.D.J.Khambatta, Senior Advocate i/b.Mr.Raval Shah
for Respondent No.8.

**CORAM :- DR.S.RADHAKRISHNAN &**
**ANOOP V.MOHTA,JJ.**

**DATE : 20TH DECEMBER,2007**

**P.C.**

1. Heard the learned Senior Counsel for the parties. By this Notice of Motion, the Respondent Nos.5 to 7 are seeking relief that Respondent No.5 company be permitted to convert interest free unsecured loan of Rs.74.50 crores advanced by the nominees of Respondent Nos.1 and 2 and Rs.3.50 crores and Rs.3.00 crores advanced by Respondent Nos.8 and 9 respectively to Equity Share Capital and appropriate

the same towards the subscription money for Equity Shares allotted to Respondent Nos.1,2,8 & 9. In the said Motion the Respondent Nos.5 to 7 further prayed that the Respondent No.5 be permitted to withdraw the sum of Rs.2.50 Crores deposited in this Court by Respondent No.5 on 10th January,2007 together with interest accrued thereon for being utilised in the on-going Hotel Project.

2. The brief facts are, that after the order dated 14th March,2005, passed by the learned Single Judge in the Notice of Motion with the following directions;

i) Any construction of the hotel by Respondent No.5 shall be in accordance with the sanctioned building plan;

ii) the creation of encumbrances on the land shall be subject to the result of the suit and written intimation thereof shall be furnished to the person in whose favour the encumbrance is created;

iii) any development carried out on the land shall be subject to the result of the suit; and

iv) Respondent No.5 shall retain 50% of the authorised share capital with itself during the pendency of the suit. There was no other or further restriction on the Respondents.

During the pendency of the Appeal, it appears that Respondent No.5 had increased the authorised Share Capital and issued 8,10,00,000 Equity Shares of Rs.10/- each to the Companies owned and controlled by the family members of Respondent Nos.1 & 2 and to Respondent Nos.8 & 9. Thereafter there is a further

subscription of Rs.7.45 Crores new Shares for cash. The Respondent Nos.8 & 9 also advanced a loan to Respondent No.5 in the sum of Rs.3.5 Crores and Rs.3.00 Crores which were converted into Equity Share Capital by issuing 35,00,000 shares to Respondent No.8 and 30,00,000 shares to Respondent No.9. It is stated that at the relevant time, the total Project cost was Rs.250 crores out of which HDFC Ltd. had required the Equity component to be Rs.100 crores and balance to be debt component. It was stated that the HDFC Ltd had informed the Respondent No.5 that they would be forced to recall the finance facility of credit to Respondent No.5 if the Equity Capital was not increased to the required amount. It is stated that under the aforesaid circumstances, an Extra Ordinary Meeting was held on 31st March,2006. A resolution was passed to increase the Authorised Share Capital from Rs.110 crores to Rs.210 crores and that under the aforesaid compelling circumstances, Respondent No.5 was forced to increase the Equity Share Capital in the interest of the aforesaid Project. It is also stated that Respondent Nos.1 and 2 through the Companies then owned 74.5% of the Equity Share Capital of Respondent No.5. The above increase in Equity Share Capital was made without the leave of this Court.

4. The Appellants herein had taken out a Notice of Motion No.1327 of 2006 under Order XXXIX Rule 2A and 11 of the Code of Civil Procedure contending that

the increase in Capital, allotment of Shares and appointment of Respondent Nos.1 to 3 as additional Directors were in breach of orders dated 22nd March,2005 and 25th October,2005 and that the Respondent should be restrained absolutely from exercising any rights or receiving any benefits in respect of the shares held by Respondent No.5.

5. The Division Bench by its order dated 15th November,2006 had set aside the aforesaid increased Authorised Share Capital on 27th and 31st March,2006 as well as the issuance of Allotment of 8,10,00,000 new Equity Shares to the Companies and Respondent Nos.8 and 9 and the appointment of Respondent Nos.1 to 3 as additional Directors.

6. However, it may be noted that in paragraph 170 of the said order dated 15th November,2006, this Court had clearly observed that it was open to take steps in accordance with law to ensure that the Project does not suffer, and that if any application is made by the Respondents for that purpose, the same would be dealt with on its own merits. In the said order, the Division Bench had also restrained Respondent No.5 from dealing or utilising the amount received towards allotment of new shares and respondent No.5 was directed to deposit in Court all the amounts received by it towards the allotment of the new shares pursuant to the resolution dated 27th and 31st March,2006. In

the said order, a liberty was also given to make an application or adopt any other proceedings in respect of the aforesaid amount.

7. The Respondent No.5 had filed affidavits dated 6th and 7th December,2006 setting out the fact that Respondent No.5 had utilised almost entire share subscription money received by it during 1st April,2006 to 16th November,2006. The loans from Respondent Nos.8 and 9 also have utilised towards the Hotel Project expenses. It was also pointed out that Respondent No.5 had re-paid HDFC Ltd Rs.54.00 Crores towards temporary loan and Respondent No.5 had also spent Rs.18.00 crores on the construction of hotel building and other Project and they had balance of only Rs.2.50 crores. In view thereof in the aforesaid order, the Division Bench by further order dated 20th December,2006 recorded that the amount of Rs.72.5 Crores would not bear any interest while it remains deposited with Respondent No.5 Company as unsecured loan and whatever interest they may accrue on Rs.2.5 crores would not be payable to the other Respondents. The Respondents also had undertaken that they will not withdraw the aforesaid amount without orders of this Court.

8. Mr.Chagla, the learned Senior Counsel appearing on behalf of the Appellants i.e. the Respondent Nos.5 to 7 herein pointed out that the

above Appeal was finally heard and disposed of by an order dated 25th April,2007 and all the interim orders in the Appeal were vacated and the Cross Objections of Respondent No.5 challenging the order of retaining of 50% of the Authorised Share Capital un-subscribed were also dismissed. Aggrieved by the aforesaid order dated 25th April,2007, the Appellants had moved a Special Leave Petition (Civil) before the Hon'ble Supreme Court, which was dismissed on 17th May,2007. Thereafter on 18th May,2007 an oral Application was made to the Hon'ble Supreme Court for clarification to the effect that the learned Single Judge would not bound by the findings in the order dated 25th April,2007, which the Hon'ble Supreme Court had refused to clarify.

9. Mr.Chagla, the learned Senior Counsel pointed out that the earlier order dated 25th April,2007 read with order dated 17th May,2005, there is no restriction on infusion of Equity into Respondent No.5 or exercise of rights and relation to the shares of Respondent No.5 or the appointment of new Directors. It is also pointed out in the above Affidavit-in-support that the Project cost has increased substantially and the construction cost is estimated at Rs.280 Crores and for the purpose of the Project, the Respondent No.5 requires further funds. The HDFC Ltd. and other financial institutions have offered to grant further financial assistance provided

the Debt-Equity Ratio is maintained. It is pointed out by Mr.Chagla, the learned Senior Counsel that, as the Project cost is increased from Rs.250 Crores to Rs.330 Crores, the Equity and Debt Ratio is required to be at least in the proportion of Rs.132 Crores to Rs.198 Crores. Mr.Chagla, the learned Senior Counsel under the facts and circumstance submits that the present Notice of Motion has been taken out seeking permission of this Court to permit Respondent No.5 to convert unsecured loan of Rs.81 Crores given by Respondent Nos.1 and 2 and their nominees and Respondent Nos.8 and 9 to Equity and appropriate the same towards subscription money for Equity Shares allotted to Respondent No.1,2,8 and 9 as also for withdrawal of the said sum of Rs.2.50 Crores deposited by Respondent No.5 and the interest accrued thereon so that the same would be utilised by Respondent No.5 only for the construction of the hotel and the on-going hotel Project.

10. Mr.Chagla, the learned Senior Counsel also pointed out that to safeguard the interest of the Appellants, the Respondent No.5 is ready and willing to give the following undertakings;

i) Respondent NO.5 is willing to undertake that if any dividend is declared by Respondent NO.5 in respect of such shares, Respondent NO.5 will forthwith deposit such dividend amount in this Hon'ble Court, pending the hearing and final disposal of the suit. In other words, Respondent Nos.1, 2(through their nominees), 8 and 9 shall not only continue to lose interest worth crores of rupees every year but shall not be entitled to

any return or any other benefit in the form of dividend or otherwise on these shares.

ii) Such an order will ensure that the promoters of Respondent NO.5 satisfy the condition of HDFC to bring their equity component for the project to the necessary level, so that the stipulated debt equity ratio of the project is maintained and so that the loan given by HDFC is not recalled. In other words, such an order will protect the interest of Respondent No.5 and all its share holders, as also the Appellants if they were to eventually succeed in this suit.

iii) Respondent No.5 is also willing to undertake suitable safeguards to ensure that all such monies if permitted to be withdrawn from this Hon'ble Court are used exclusively for the said hotel project of Respondent NO.5 and not in any manner returned to either Respondent No.1,2 (through their nominees), 8 and 9, directly or indirectly.

11. Mr.Chagla, the learned Senior Counsel also pointed out that the main reason for the orders dated 15th November,2006 and 20th December,2006 was that the Respondent No.5 had not approached this Court seeking prior permission before allotting the shares and utilising the same and increasing the Equity etc. Mr.Chagla, the learned Senior Counsel also pointed out that keeping the aforesaid sum of Rs.72.50 Crores as Unsecured loan without any interest, the Company has already suffered a loss of Rs.6 Crores which would be a sufficient atonement, in the sense, the Company ought not to be perennially punished for the wrong committed and in the interest of the on-going Hotel Project which would be beneficial to the Appellants also, if they succeed in the suit, the above Notice of Motion be granted.

12. Mr.Samdani, the learned Senior Counsel appearing on behalf of the Appellants referred to the Affidavit-in-reply dated 4th December,2007 filed on behalf of the Appellants and sought to oppose mainly contending that the same would cause prejudice to the Appellants. He further fairly states that by the Division Bench order disposing of the above Appeal, it was made clear that 50% of the Equity Shares are always kept available for the Appellants in the event they finally succeed in the suit.

13. Having regard to the aforesaid facts and circumstances of the case and also as it should not affect the on-going Hotel Project, which would be beneficial to the Appellants also, if they succeed in the suit, the relief sought by Respondent Nos.5 to 7 is quite fair and in view of the categorical undertaking, which Respondent No.5 willing to give. We do not find any substance in the contentions of Mr.Samdani, that the Appellants will be prejudiced. On the contrary, it will be beneficial to the Appellants also, provided they succeed in the suit. It should be noted here that 50% of the Equity Shares will always be kept available for the Appellants, if they succeed in the suit. Under the aforesaid facts and circumstances of the case, the Notice of Motion is made absolute in terms of prayer clauses (a) & (b), subject to filing an undertaking by Respondent No.5 within a period of four weeks from today,

incorporating therein;

i) Respondent NO.5 is willing to undertake that if any dividend is declared by Respondent NO.5 in respect of such shares, Respondent NO.5 will forthwith deposit such dividend amount in this Hon'ble Court, pending the hearing and final disposal of the suit. In other words, Respondent Nos.1, 2(through their nominees), 8 and 9 shall not only continue to lose interest worth crores of rupees every year but shall not be entitled to any return or any other benefit in the form of dividend or otherwise on these shares.

ii) Such an order will ensure that the promoters of Respondent NO.5 satisfy the condition of HDFC to bring their equity component for the project to the necessary level, so that the stipulated debt equity ratio of the project is maintained and so that the loan given by HDFC is not recalled. In other words, such an order will protect the interest of Respondent No.5 and all its share holders, as also the Appellants if they were to eventually succeed in this suit.

iii) Respondent No.5 is also willing to undertake suitable safeguards to ensure that all such monies if permitted to be withdrawn from this Hon'ble Court are used exclusively for the said hotel project of Respondent NO.5 and not in any manner returned to either Respondent No.1,2 (through their nominees), 8 and 9, directly or indirectly.

14. The Notice of Motion stands disposed of in terms of the above.

15. The learned Counsel for the Appellants prays for stay of this order for a period of four weeks from today. We do not find any ground to grant stay.

Application for stay is rejected.

16. Issuance of certified copy is expedited.

**(ANOOP V.MOHTA,J.)** **(DR.S.RADHAKRISHNAN,J.)**